



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 1, 2004

Ms. Ruth Reyes
Assistant City Attorney
City of El Paso
2 Civic Center Plaza, 9th Floor
El Paso, Texas 79901

OR2004-7457

Dear Ms. Reyes:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 208438.

The City of El Paso (the "city") received a request for the bids submitted by three companies to the city in response to solicitation of offers numbers 2004-119 and 2004-120. You state that the city has released some information to the requestor. You claim that portions of the remaining requested information may be excepted from disclosure under sections 552.101 and 552.104, but make no arguments and take no position as to whether the information is so excepted from disclosure. Further, you state that the request may involve third party privacy or proprietary interests. Accordingly, you indicate and provide documentation showing that you notified dmDickason Personnel Services ("dmDickason"), Advance'd Temporaries ("Advance'd") and Adecco Employment Services ("Adecco") of the requests for information pursuant to section 552.305 of the Government Code and of their right to submit arguments explaining why the information concerning them should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information. We have also considered arguments submitted to this office by dmDickason and Adecco.

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Advance'd has not submitted comments to this office in response to the section 552.305 notice; therefore, we have no basis to conclude that Advance'd has a proprietary interest in the submitted information. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, the city may not withhold any portion of the submitted information on the basis of any proprietary interest that Advance'd may have in the information. Because this office has received no other arguments for withholding the submitted information, it is not excepted from disclosure to this requestor.

Next, we address the applicability of section 552.101 of the Government Code to the submitted information. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception protects information that is considered to be confidential under other law. *See* Open Records Decision Nos. 611 at 1 (1992) (common law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (information made confidential by statute). However, neither Adecco nor the city has directed our attention to any law under which any of the submitted information is deemed confidential for purposes of section 552.101. dmDickason argues that its taxpayer identification number, as reflected on W-9 forms included in the submitted information, is confidential under section 6103(a) of title 26 of the United States Code. *See* 26 U.S.C. § 6103(a). Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *dismissed in part, aff'd in part, vacated in part, and remanded*, 993 F.2d 1111 (4th Cir. 1993). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of income, payments, tax withheld, deficiencies, overassessments or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return . . . or the determination of the existence, or possible existence, of liability . . . for any tax, . . . penalty, . . . , or offense[.]" *See* 26 U.S.C. § 6103(b)(2)(A) (emphasis added). We find Form W-9 does not fall within the purview of section 6103 because it does not constitute return information as contemplated by section 6103. Therefore, the city may not withhold Form W-9 or the corresponding

taxpayer identification number under section 552.101 in conjunction with section 6103 of title 26 of the United States Code.

Further, dmDickason appears to argue that portions of the submitted information are confidential pursuant to judicial decision and cites *The dmDickason Management Group, Inc. v. John C. Ramos*, Cause No. 2001-2451, 168th District Court, El Paso County, Texas. However, upon review of the information submitted by dmDickason, we conclude that this case does not determine the confidentiality of any information for purposes of the Act. Accordingly, the information cannot be withheld under section 552.101 in conjunction with the above referenced decision.

Adecco and dmDickason also argue the applicability of section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." This section excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect the interests of a governmental body, not third parties. See Open Records Decision No. 592 (1991). Therefore, because the city has chosen not to argue section 552.104 in this instance, none of the submitted information may be withheld on this basis.

We next turn to Adecco and dmDickason's claims under section 552.110 of the Government Code. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); see also Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates

or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).¹ This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) applies unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. See Open Records Decision No. 402 (1983).

Section 552.110(b) excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." Gov't Code § 552.110(b). An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. Cf. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Normally, an interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of requested information. See Open Records Decision No. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure).

Adecco objects to the release of its customer references, lists of recruiting efforts, information concerning its selection procedures and its insurance certification under section 552.110. Having considered Adecco's submitted arguments, we find that the information

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

we have marked in Adecco's proposal is a trade secret; therefore, this information is excepted from release under section 552.110(a). However, none of the remaining information in Adecco's proposal is excepted from release under section 552.110(a). Further, we find that Adecco has not established that the release of any of the remaining information would likely cause substantial competitive harm to Adecco; therefore, none of the remaining information is excepted from release under section 552.110(b).

In addition to its taxpayer identification number, addressed above, dmDickason objects to release of: (1) credentials of individuals who will personally oversee the contract and the names of dmDickason staff members and their positions; (2) customer references with whom dmDickason has large volume contracts; (3) description of its procedures regarding the testing and training of employees; (4) description of recruiting sources; and (5) statement of selection procedures used to recruit and screen personnel. Having considered dmDickason's arguments, we find that the information we have marked in dmDickason's proposal is trade secret; therefore, this information is excepted from release under section 552.110(a). However, none of the remaining information in dmDickason's proposal is excepted from release under section 552.110(a). Further, we find that dmDickason has not established that the release of any of the remaining information would likely cause substantial competitive harm to dmDickason; therefore, none of the remaining information is excepted from release under section 552.110(b).

Finally, we note that the city has redacted e-mail addresses and insurance policy numbers from the submitted documents. You do not assert, nor has our review of our records indicated, that you have been granted a previous determination to withhold any such information without seeking a ruling from this office. Because we can discern the information that has been redacted, being deprived of this information does not inhibit our ability to make a ruling *in this instance*. Nevertheless, be advised that a failure to provide this office with requested information generally deprives us of the ability to determine whether information may be withheld and leaves this office with no alternative other than ordering that the redacted information be released. *See* Gov't Code § 552.301(e)(1)(D) (governmental body must provide this office with copy of "specific information requested").

The marked insurance policy numbers are subject to section 552.136 of the Government Code. Section 552.136 states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. We agree, therefore, that the city must withhold the insurance policy numbers you have redacted under section 552.136.

In some instances, e-mail addresses obtained from members of the public are excepted from disclosure under section 552.137 of the Government Code. Section 552.137 makes confidential certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body. However, this exception does not apply to an e-mail address that is provided to a governmental body either by a person who has a contractual relationship with the governmental body or that is

contained in a response to a request for bids or proposals. Gov't Code § 552.137(c)(1), (3). The e-mail addresses at issue are the business e-mail addresses of individuals who have contractual relationships with the city, and they are contained in responses to requests for bids or proposals. Therefore, the e-mail addresses may not be withheld under section 552.137.

In summary, the information we have marked in Adecco's and dmDickason's proposals must be withheld under section 552.110(a) of the Government Code. The insurance policy numbers you have redacted must be withheld under section 552.136 of the Government Code. All remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).


If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cary Grace
Assistant Attorney General
Open Records Division

ECG/jev

Ref: ID# 208438

Enc. Submitted documents

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